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442862—57——1

In the Supreme Court of the United States

OCTOBER TERM, 1957

No.

THE UNITED STATES, PETITIONER

v.

CITIZENS UTILITIES COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Claims entered in the above cases on March 6, 1957.

OPINION BELOW

The opinion of the Court of Claims (App. B, *infra*, pp. 22–32) is not yet reported.

JURISDICTION

The Court of Claims granted summary judgment for respondents on March 6, 1957 (App. B, *infra*, p. 32), and timely petitions for rehearing by the United States and the third parties were denied on June 5, 1957 (App. B. *infra*, p. 32). By order of Mr. Justice Black, dated August 27, 1957, the time for filing a petition for a writ of certiorari

was extended to and including October 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether under Section 5 (b) of the Boulder Canyon Project Act holders of resale contracts for Hoover Dam electric energy temporarily unused by a prime purchaser are entitled as a matter of right to renewal of these contracts upon their expiration.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Boulder Canyon Project Act, 45 Stat. 1057 (43 U. S. C. 617, *et seq.*), and of the Regulations adopted pursuant thereto are set out in Appendix A, *infra,* pp. 18–22.

STATEMENT

The Boulder Canyon Project Act, *infra,* p. 18, in authorizing construction of the Hoover Dam, the largest of the federal public power projects, required the Secretary of Interior to provide by contract for revenue sufficient to assure the repayment within fifty years of the entire cost of the proposed dam (B. 16–17).[1] Accordingly, the Secretary of Interior in 1930 entered into contracts by which he sold 100 percent of the estimated firm energy or output of the Hoover Dam to the City of Los Angeles, the Southern

[1] References "B —" are to the bound volume which constitutes the Government's Exhibit 1 to its answer in these cases in the Court of Claims. This volume, which contains the complete text of all of the contracts involved herein is entitled "Boulder Canyon Project Final Reports, Part I—Introductory, Bulletin 2, Hoover Dam Power and Water Contracts and Related Data, the United States Department of Interior, Bureau of Reclamation."

California Edison Company and the Metropolitan Water District of Southern California, subject to optional allocations granted to the states of Arizona and Nevada and to certain municipalities in Southern California (B. 291, 323, 343, 351).[2]

By virtue of these contracts City and Edison were established as several lessees of the power facilities to be constructed as part of the proposed dam, with the obligation to generate power at cost (B. 291, 343). Water District was to use its share of this electrical energy for the sole purpose of pumping Colorado River water into and through an aqueduct which it planned to construct and place into operation in the immediate future (B. 323, 351). In view of the fact that at the time of the execution of its contract Water District's aqueduct was as yet unbuilt and its needs relatively uncertain, a supplementary contract with Water District (B. 354–355) authorized the Secretary of Interior to dispose of any energy not used by

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[2] This estimated firm energy finally was allocated as follows (B. 299–300, 325–326, 1115–1116):

1. Water District was obliged to take 36 percent of all firm energy.

2. City was obliged to take 13 percent.

3. Edison was obliged to take 9 percent (California Electric Power Company and others shared in a portion of this allotment).

4. Eighteen percent was allocated to the State of Arizona and 18 percent to the State of Nevada, but if neither could use such amount, and the Water District could not use it either, then the excess amount would be taken equally by City and Edison.

5. The remaining 6 percent was allocated to certain municipalities of Southern California with the stipulation that if such municipalities failed to contract for or use such amount, then City should take the residual amount.

Water District for the purpose allotted, and to credit the proceeds from such disposition to Water District's account. Before he could dispose of this energy to any outside purchaser, however, the Secretary was required to offer it on the same terms to City and Edison.

Early in 1937, shortly after the opening of the power facilities of the newly completed Hoover Dam, Citizens Utilities Company and Needles Gas and Electric Company (predecessor in interest to California-Pacific Utilities Company, hereinafter Cal-Pac) sought to obtain portions of the firm energy then unused by Water District under its contract (Exhs. 2, 3; R. 156–160). Negotiations were commenced and the details of the so-called "resale" contracts worked out between respondents and Water District (Exh. 9; R. 170–172), since the energy was being sold for Water District's account by the Secretary of Interior (Exhs. 2, 11, 12; R. 156–159, 174–178). The parties originally contemplated ten-year resale contracts, but Citizens decided subsequently that a ten-year period was too short to allow recovery of its entire investment in the transmission line which it would have to build from the dam to Kingman, Arizona, and requested a fifteen-year resale contract (Exh. 8; R. 170). Water District agreed to a fifteen-year contract (Exh. 9; R. 170–171), and Citizens then applied for and obtained permission from the Arizona Corporation Commission to write off the complete cost of this transmission line over the life of the contract (Exh. 31; R. 222–224).

Pursuant to the terms of Water District's 1930 contract, its unused firm energy was first offered to City

and Edison (Exhs. 13, 14, 15; R. 178–183) which raised no objection to the temporary resale of this energy since they did not desire to purchase it themselves at that time under the terms offered to respondents (Exhs. 16, 17, 18; R. 184–193). The resale contracts were then forwarded to Water District for its approval and submitted to the Secretary of Interior for formal execution (Exhs. 21, 27; R. 198, 209). Resale contracts bearing expiration dates of December 31, 1954, were formally executed with Citizens on January 7, 1938 (B. 657) and with Needles Gas and Electric on December 28, 1937 (B. 639).

Upon passage of the Boulder Canyon Project Adjustment Act (54 Stat. 774; B. 33), the Secretary of Interior in 1941 approved and promulgated "General Regulations for Generation and Sale of Power" in accordance with the new statute (B. 1129). Pursuant to these regulations and subsequent contracts, City and Edison became agents of the United States in the operation of the power facilities, and a new rate-making system for the sale of Hoover Dam energy was instituted which granted lower rates to the original allottees. By the terms of respondents' resale contracts, such benefits were also to be extended to them. Accordingly, new resale contracts were executed in 1941 between the United States and respondents, which superseded the original contracts and which by specific reference were made subject to all terms and provisions of the 1941 General Regulations referred to above (B. 985, 1001). In all other respects, the 1941 resale contracts were identical with respondents' ear-

lier contracts (R. 5, 35); both sets of contracts carried the same expiration date, December 31, 1954, the same annual maximum amounts of energy to which respondents were entitled, and the same minimum annual amounts which they guaranteed to purchase (B. 642, 645, 660, 663, 987, 991, 1003–1004, 1007).

The substantial remaining amount of surplus energy not bought by respondents was carried as a financial burden by Water District until May, 1942, when the wartime energy needs of a federally owned magnesium plant took up all of this surplus and a part of other allotments. The power supply contract of the defense plant was to expire on May 31, 1945, however (B. 933, 935), and Water District faced the possibility of a resumption of its financial burden. In order to forestall this possibility, Water District in 1945 requested the Secretary of Interior to resell all of its unused energy allotment for the entire life of its contract, which ran to 1987 (Exh. 30; R. 214). The Secretary of Interior thereupon offered all of Water District's unused energy until 1987 to City, Edison and California Electric Power Company, in accordance with the contracts of these parties and with the terms of Article 4 (b) (iv) of the 1941 Regulations, *infra*, p. 21, which provided that the Secretary could not dispose of Water District's surplus firm energy without first offering to the other original allottees the opportunity to contract for the energy on equal terms and conditions. City, Edison and California Electric accepted the offer, and by contract dated May 31, 1945, they purchased until 1987 all energy contracted for by Water District but

unused by it for pumping water into and through its aqueduct, subject to the respondents' rights to power under their resale contracts (R. 1061).

Some time prior to December 31, 1954, the expiration date of their resale contracts, respondents initiated attempts to have their resale contracts renewed (R. 6–7), claiming by virtue of Section 5 (b) of the Boulder Canyon Project Act, *infra*, p. 19, that they were entitled to renewal as a matter of right. Section 5 (b) provides, *inter alia*, that "[t]he holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations * * *." The Secretary of Interior refused to renew the contracts on the ground that the renewal rights guaranteed by Section 5 (b) applied only to the primary contracts for Hoover Dam power, not to resale contracts, and that, since all of Water District's unused firm energy had been sold by the 1945 contract, there was no firm energy available for resale to respondents (R. 7).

In December 1954, Citizens obtained a temporary restraining order from the United States District Court for the District of Arizona against termination of delivery of Hoover energy to the utility, but this order was dissolved in January 1955, and respondents then filed these suits in the Court of Claims (R. 9). In their petitions below they alleged the continued right to receive the energy covered by their now expired contracts, and sought recovery of the damages allegedly

resulting from the deprivation of this right.[3] The City of Los Angeles, Southern California Edison Company, California Electric Power Company, and the Metropolitan Water District of Southern California were brought in as third parties by the United States, and the two suits were consolidated for trial. Upon cross motions for summary judgment (R. 99, 225, 271), the Court of Claims granted respondents' motions and denied those of the United States, holding that respondents were entitled under Section 5 (b) of the Boulder Canyon Project Act, *infra*, p. 19, to renewals of their resale contracts, and ordering further proceedings to determine the extent of the damages which respondents had suffered from the failure of the United States to renew the contracts (R. 609–617).

REASONS FOR GRANTING THE WRIT

The Court of Claims, in holding that Section 5 (b) of the Boulder Canyon Project Act automatically entitled respondents to renewal of their resale contracts for electrical energy, has patently misconstrued the statute, and thereby thrown into confusion the admin-

[3] Respondents claimed as elements of damages (1) the amounts expended by them in constructing transmission lines from Hoover Dam to points of use, and (2) the amounts estimated to be the anticipated additional cost of replacing Hoover Dam power by other sources from December 31, 1954, the date of expiration of their resale contracts, to the 1987 expiration date of Water District's contract. In addition, Citizens sought to recover the cost of a transmission line not connected in any way with Hoover Dam, but which it claims to have begun building in reliance upon receiving a renewal of its resale contract. Cal-Pac's total claim of damages amounted to $4,579,807, and Citizen's to $12,216,775, making a total claim in both cases of $16,796,582. (R. 11–12, 38.)

istration of the Boulder Canyon Project at least through 1987. The fundamental importance of this issue to the orderly functioning of the nation's largest hydro-electric development warrants this Court's review.

1. Respondents' claims rest entirely upon the alleged application to their contracts of Section 5 (b) of the Boulder Canyon Project Act, which provides, *inter alia*, that

> The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations * * *.

The context and purpose of Section 5 (b) require that this provision apply only to the original allottees of Hoover Dam power, under which 100 percent of the project's firm energy was sold by the Department of Interior to parties other than respondents, and not to resale contracts for the disposition of surplus power not needed by an original allottee.

a. In formulating the basic plan for distribution of Hoover Dam energy, Congress set out in Section 5 of the Boulder Canyon Project Act specific provisions to be incorporated in the primary contracts for the sale of this power. These provisions were intended to insure return of invested capital, to protect the public interest in the proper distribution of the power, and to afford certain protections to the prime contractors themselves, in view of their undertaking to pay for specific amounts of Hoover Dam energy for a fifty-

year period and their substantial investments in transmission lines and other facilities in order to use this power. Thus, subsection (a) of Section 5 limited the duration of such contracts to fifty years, with a proviso for certain adjustments of contract rates after a specified number of years; subsection (b) made these contracts renewable upon expiration if the purchasers were not in default; subsection (c) directed the Secretary of Interior to contract only with certain responsible applicants, and instructed him to resolve conflicting claims in the public interest; and, finally, subsection (d) required larger contractors, upon timely notice, to share their transmission lines with smaller ones. Read, as of course it must be, in conjunction with the other provisions of Section 5, subsection 5 (b), in granting a right of renewal to the holder of "any contract for electrical energy," refers to these primary contracts contemplated by the Act.

That Congress intended the word "contract" in Section 5 (b) to have only this limited meaning is demonstrated by its consistent use of the word throughout the other portions of the section to describe only the primary contracts. Thus, Section 5 provides, in its general grant of authority, "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the * * * generation of electrical energy and delivery at the switchboard * * * upon charges that will provide revenue * * *." This provision alone establishes that the word "contract" as used in Section 5 (b) refers only to the primary contracts contemplated by the Act. And

this conclusion is fully borne out by the other subdivisions of Section 5: subsection (a) specifies that "[c]ontracts made pursuant to subdivision (a) of this section shall be made with a view of obtaining reasonable returns * * *;" and subsection (c) expressly declares that "[c]ontracts * * * for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. * * *" Thus, all of the language of Section 5 of the Act specifically refers to the contracts made by primary allottees.

b. Respondents' contracts formed no part of this integrated plan of mutual benefit and obligation between the United States and the primary purchasers of electrical energy. On the contrary, these contracts by their very terms were "resale" contracts, disposing of surplus energy for which Water District, a prime contractor, was obligated to pay, but for which it had no present need. Respondents' contracts were totally unlike the prime contracts under which the Secretary had already disposed of 100 percent of the dam's firm energy; they were of shorter duration, and expressly limited to the period during which Water District had said it did not need this energy, and they obligated respondents to take only a small proportion of the maximum amount of power to which they were entitled. Respondents, as "subcontractors" for this surplus energy, at no time assumed Water District's primary obligation to pay the United States for this energy. The authority for their contracts was de-

rived, not from Sections 4 and 5 of the Act, but rather from the terms of the prime contract between Water District and the United States, which, as stated above (*supra*, pp. 3–4), authorized the Secretary of the Interior to dispose temporarily of any firm energy not used by Water District for the operation of its aqueduct, and to credit the proceeds from such disposition to Water District's account.

Thus, in contracting with respondents, the Secretary of Interior was simply disposing of electrical energy which belonged to Water District. Although in the public interest he kept control of the ultimate disposition of this surplus power, there was no financial gain to the United States from its sale to respondents; regardless of the terms of these resale contracts, the United States would by virtue of the prime contracts receive payment for 100 percent of the dam's energy. The negotiations were carried on between respondents and Water District, the real parties in interest, and the final terms of the respondents' contracts were settled between these parties. Clearly, these resale contracts could not confer upon respondents the status of prime contractors with the United States entitled to the renewal provisions of Section 5 (b).

2. Moreover, at no time prior to respondents' applications for renewal did any of the parties concerned—respondents, Water District or the United States—consider that these temporary resale contracts would be entitled to the renewal privileges of Section 5 (b). On the contrary, respondents were at all times fully aware that they were subcontracting on a fifteen-year

basis for energy contracted for but temporarily not required by Water District. All of the correspondence relating to the negotiations for respondents' contracts made perfectly clear that only rights for this limited period were involved. Thus Citizens initially requested a fifteen-year contract because the proffered ten-year term was too short to recover its investment, and immediately after approval of the longer period by Water District, it applied for and received permission from the Arizona Corporation Commission to amortize the full cost of its transmission line over this fifteen-year period (*supra*, p. 4). The primary allottees, too, understood that this arrangement was only a temporary one. Neither Water District nor the other primary contractors intended to relinquish their right to any of Water District's energy beyond December 31, 1954, the expiration date of the resale contracts.

Respondents, of course, were completely aware of the preference rights of the other primary contractors to Water District's surplus energy, and since their contracts provided specifically for a fifteen-year term, they clearly could not have believed that they were obtaining *permanent* rights to this surplus energy in derogation of these outstanding preferences.

This understanding by the parties of the temporary nature of respondents' arrangement was expressly incorporated into the provisions of the resale contracts. Both of respondents' 1938 contracts make specific reference to Water District's prime contract with the United States (B. 641, 659, 660), and recite that each of

the respondents "has made application to the Secretary for the resale to it *for the term of this contract* of a part of the firm energy contracted for by the District, but which will not be required, *temporarily,* for pumping water into and in the aforesaid aqueduct * * *" (B. 641, 659; similar recitals appear in their 1941 contracts, B. 986, 1002). This language is in sharp contrast to that in the prime contracts with City, Edison and Water District, which contained specific contract renewal provisions repeating almost verbatim the wording of Section 5 (b) (B. 309, 336).

3. Finally, even if Section 5 (b) can be read to cover respondents' resale contracts, renewal of these agreements was properly refused. The right of renewal granted by the statute is expressly conditioned upon "such terms and conditions as may be authorized or required under the then existing laws and regulations * * *." The Secretary's Regulations of 1930 and 1941 recognize and incorporate the preference rights of Water District, City, Edison, and California Electric. Thus, Article 4 (b) (iv) of the Secretary's 1941 Regulations (App. A, *infra,* p. 21), currently in force, authorizes the disposition of Water District's surplus energy, "provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to [the other prime contractors] the opportunity to contract on equal terms and conditions * * *" for this energy. This Regulation was promulgated according to express statutory authority, and is incorporated by specific reference in

respondents' 1941 resale contracts. It furthers the statutory scheme already discussed, *supra,* pp. 9–10, by recognizing and protecting the contractual rights of the other prime contractors to first refusal of Water District's surplus energy, and is clearly a valid implementation of the purposes of the Act. Thus by both the express language of the Act and the terms of respondents' own contracts, any statutory rights respondents may have to renewal of their resale contracts are subject to the prior rights of City, Edison and California Electric as set out in the regulations. Only to the extent that these prime contractors do not choose to exercise their preferential rights can respondents have any claim at all to renewal of their resale contracts.

Far from waiving their preferential rights to Water District's surplus energy, however, City, Edison and California Electric have expressly exercised these rights. By the contract of May 31, 1945 (*supra,* p. 6) between these parties, Water District and the United States, City, Edison and California Electric, in accordance with their preference rights under Article 4 (b) (iv) of the 1941 Regulations, purchased all of Water District's surplus energy until 1987—the entire life of Water District's prime contract. And, while Article 5 of the 1945 contract specifically recognized that respondents had been sold a portion of this energy through 1954, as to which City and Edison had previously waived their preferential rights, it made no provision for further waiver of preference rights upon expiration of these short-term resale contracts.

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Whatever statutory renewal rights respondents possessed were thus legitimately extinguished by the execution of the 1945 contract, by which City, Edison and California Electric exercised their preference rights to the remainder of Water District's surplus energy. No statutory or contractual rights of respondents were violated by the Secretary's subsequent determination that their resale contracts could therefore not be renewed.[4]

4. The issue in this case is important. The carefully considered plan for the marketing of the electrical energy of the Boulder Canyon Project, with its complex network of mutual obligations and benefits, is disrupted by the erroneous decision of the Court of Claims. In clothing respondents' resale contracts with primary renewal rights, the decision below does violence to the intent and purpose of the statutory scheme, and creates extremely serious administrative problems. As a result of this decision, the Secretary of Interior cannot safely make any short-term interim arrangements for disposition of surplus energy, since such temporary contracts are now automatically clothed

[4] The opinion of the court below, in holding that respondents were entitled to renewal of their resale contracts, fails even to mention the 1941 Regulations, or to mention the decision in *California Electric Power Company* v. *United States*, 104 C. Cls. 289, 321, where the Court of Claims held that the Government was obliged to adhere to these very option provisions which the court now ignores.

with the statutory renewal rights which the Court of Claims has read into respondents' resale contracts. But to fail to make such arrangements may place an unnecessary burden on the primary allottees.

In these circumstances, the United States seeks review of the judgments below not merely because of the considerable sum of money which it may be required to pay—respondents seek almost seventeen million dollars in damages—but also because of the fundamental difficulties and uncertainties injected into the carefully developed plan for the operation of the vast Boulder Canyon Project. Since the case involves a sharp question of law, namely the meaning of Section 5 (b) of the Act, rather than of fact, it is an appropriate one for the grant of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
ROBERT S. GREEN,
Attorneys.

OCTOBER, 1957.

APPENDIX A

Section 5 of the Boulder Canyon Project Act of 1928, 43 U. S. C. 617d, 45 Stat. 1060, provides as follows:

> That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.
>
> After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.
>
> General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision

(b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to

meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from

engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

Article 4 (b) (iv) of the 1941 General Regulations for Generation and Sale of Power in Accordance with the Boulder Canyon Project Adjustment Act provides as follows:

(iv) In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it, then the Secretary shall dispose of such unused energy until required by the District, crediting on the District's obligation the proceeds of such disposition as received; provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to the City, the Company and The Nevada-California Electric Corporation the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for such energy, in the same proportion, and subject to the same rights with respect to proportions thereof not taken by others, as in the case of secondary energy. The rights

of the City, the Company and The Nevada-California Electric Corporation so to contract shall be deemed to have been waived unless, within 30 days after offer by the Secretary of such opportunity, such offer is accepted.

APPENDIX B

1. Opinion of the Court of Claims dated March 6, 1957:

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 6, 1957)

No. 364–55

CITIZENS UTILITIES COMPANY v. THE UNITED STATES

CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES

No. 381–55

CALIFORNIA-PACIFIC UTILITIES COMPANY v. THE UNITED STATES

CITY OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, CALIFORNIA ELECTRIC POWER COMPANY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THIRD PARTIES

Mr. Arthur S. Friedman, for the plaintiff in No. 364–55. *Messrs. Milton S. Gould, Ellis Lyons,* and *Gallop, Climenko & Gould* were on the briefs.

Mr. Ezekiel G. Stoddard, for the plaintiff in No. 381–55. *Messrs. Arnold M. Lerman* and *Cox, Langford, Stoddard & Cutler* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant. *Messrs. Francis J. Robinson* and *Gerson B. Kramer* were on the brief.

Mr. John H. Mathews for the City of Los Angeles. *Messrs. Roger Arnebergh, Gilmore Tillman*, and *Ely, McCarty and Duncan* were on the brief.

Mr. Edmund L. Jones for the Southern California Edison Company. *Messrs. Arthur J. Phelan, Paul R. Connolly, Bruce Renwick*, and *Harry W. Sturges, Jr.* were on the brief.

Mr. Edmund L. Jones for California Electric Power Company. *Messrs. Henry W. Coil* and *Donald J. Carman* were on the brief.

Mr. James H. Howard for The Metropolitan Water District of Southern California. *Messrs. Donald M. Keith* and *John W. Dickey* were on the brief.

ON DEFENDANT'S AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiffs sue the United States for damages because the United States refused to renew their contracts for electrical energy produced at the Hoover Dam on the Colorado River. The two suits have been consolidated since they involve the same issues. The four "third parties" were brought into the case on notices, requested by the United States and issued by the court pursuant to its Rule 19. The facts in the cases appear from undisputed documents, and the cases are suitable for decision on motion for summary judgment.

The Boulder Canyon Project Act, 45 Stat. 1057, enacted in 1928, authorized the construction and operation of Boulder Canyon Dam and related facilities.

But the Act required that, before any appropriations were made or any construction was commenced, the Secretary of the Interior should obtain contracts which would bring the United States enough revenue to repay it, with interest, within 50 years, the money proposed to be advanced by the United States for the construction of the dam, together with all expenses of operation and maintenance. The Secretary on April 26, 1930, entered into a contract with the City of Los Angeles and Southern California Edison Company, Ltd., hereinafter called, respectively, City and Edison, which are two of the third parties in this suit. Under this contract City and Edison were made, severally, lessees of parts of the proposed dam and the power plant machinery, their two parts constituting the whole, and they were obligated to generate, at cost, electrical energy for themselves and for others with whom contracts would be made. City and Edison also agreed to be responsible for paying for 64 percent of the energy produced at the dam, subject, however, to the rights of the States of Arizona and Nevada to take large amounts of this 64 percent allotment when and if they so desired, and subject to the rights of several municipalities in Southern California to take 6 percent of this allotment if they made contracts to do so within a specified time. The allotments of City and Edison, amounting in all to 64 percent, were several, but the detailed percentages of their obligations are not relevant here. But they were obliged, between them, to take and/or pay for all of the 64 percent if no other entity exercised its option to take a part of it.

The Secretary of the Interior reported to Congress that the City-Edison contract was sufficient by itself to provide revenues to pay for the project.

On April 26, 1930, the date of the City-Edison contract, the Secretary also made a contract with the

Metropolitan Water District of Southern California, herein called Water District. It is one of the third parties in these suits. Water District was obligated, by its contract, to take and/or pay for 36 percent of the energy generated at the dam. Water District wanted the energy to pump Colorado River water into the aqueduct which it proposed to build from the dam to the City of Los Angeles. City and Edison wanted to be certain that Water District did not use any of the energy which it bought to compete with them in the electrical utility business in their areas. The Secretary therefore inserted in Water District's contract a provision that it could use the energy only for pumping water into its proposed aqueduct. That restriction created the possibility that Water District might have to pay for a lot of energy that it could not use. Water District's contract provided, in that regard, that the Secretary might dispose of Water District's unused energy by first offering it to City and Edison and, if they did not buy it, selling it to others.

The municipalities in California which had options to take, in all, 6 percent of City's allotment exercised their options within the time specified, and the Secretary executed contracts with them in 1931. In 1936, before the dam was completed, the State of Nevada chose to take a part of the 18 percent on which it had an option, and the Secretary made a contract with it.

Water District's obligation to begin to take and/or pay for its 36 percent was to become effective when two billion kilowatt hours of energy per annum became available. When that time approached in 1937, Water District advised the Secretary that there would be surplus energy available for resale and that that condition would exist until the end of 1954. The Secretary advised City and Edison that the surplus energy was available, but they did not exercise their

options to take it. The plaintiffs negotiated with the Secretary and with Water District, which would be the beneficiary of the resale contracts if made. Ten-year contracts were at first considered, but the plaintiff Citizens thought this was too short a period for it to recover the investment which it would have to make in building a transmission line from the dam to Kingman, Arizona, in order to use the power from the dam. It was then decided that the contracts should run to December 31, 1954, and they were so written. The contracts bound the plaintiffs to take and pay for only a small proportion of the energy which they had the right to take and pay for at their option.

The parties proceeded according to the contracts, and the plaintiffs received the part that they were entitled to, and chose to take, of Water District's surplus. On May 31, 1945, the Secretary made a contract with City and Edison, among others, which, the defendant says, conveyed to those contractors all of Water District's unused energy, including that which the plaintiffs were getting under their contracts, but, as to that latter amount, the sale not becoming effective until the end of the plaintiffs' contracts on December 31, 1954.

The plaintiffs, when the termination dates of their contracts approached, applied to the Secretary for renewals of their contracts. These applications were rejected, and the plaintiffs have received no electrical energy under their contracts since shortly after the date of expiration of their contracts. They claim to have been heavily damaged by the Secretary's refusal to renew their contracts, and sue here for those damages. They base their claim upon section 5 (b) of the Boulder Canyon Project Act which says:

> The holder of any contract for electrical energy not in default thereunder shall be en-

> titled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

The plaintiffs say, correctly, that they were the holders of contracts for electrical energy, and were not in default under their contracts. Therefore, they say, the statute applied to them. The Government says that the plaintiffs read the statute too literally, and thereby miss its meaning. The Government says that the statute intended to grant the renewal privilege only to those who, in effect, underwrote the project, by binding themselves to take and/or pay for electricity from the project at a time when such promises were a condition precedent to the appropriation of money for and the building of the project. It says that entities like the plaintiffs, who made contracts only for surplus energy available for resale, and whose contracts were for relatively short periods, were not intended to be covered by the renewal provision.

The plaintiffs find flaws in the Government's "underwriters" argument. They point out that although Water District made its contract, on the same day that City and Edison made theirs, to take and/or pay for 36 percent of the energy produced, Water District at that time was a new corporation, not yet financed, and the Secretary, in reporting to Congress that sufficient revenues were assured by contracts, did not include Water District's contract as an asset. They point out that the several municipalities in Southern

California which had what were, in effect, options to take a part of the energy contracted for by City, were not underwriters of the project, because before they made their contracts, City had already obligated itself to pay for the energy which they later contracted for. Yet their contracts, when made, contained express renewal provisions. The same seems to have been true of contracts later made by the Secretary with the States of Arizona and Nevada.

If there is any valid distinction between the contracts of the plaintiffs and those of other entities whose contracts did give them renewal rights, it would seem to be that the plaintiffs' contracts covered only surplus energy, disposed of by the Secretary because the one who had contracted to pay for it had no use for it. Is this difference sufficient to deprive these contracts of the renewal privilege written into section 5 (b) of the Project Act?

The plaintiffs' contracts contained no provision for renewal. When Water District advised the Secretary that it would have surplus energy for disposal, it said that that would be true until the end of 1954. When the plaintiffs applied to the Secretary in 1937 for some of this surplus, they apparently had no thought of any right of renewal. They say, and apparently correctly, that the information which they had, indicated that the subject matter of their proposed contracts, i. e., surplus energy in Water District's allotment, would not exist after 1954. If the failure of the plaintiffs to insist on, or even think about, a right of renewal were urged, which it is not, as a waiver of their statutory rights under section 5 (b), the circumstances might well rebut any inference of an intent to waive.

By the year 1945, Water District had apparently decided that it would have surplus energy for all the rest of the term of its 50-year contract. The situation

was acute at that time because a defense plant which had been taking and paying for a large amount of Water District's surplus energy, had closed down. By that time, City and Edison were willing to agree to take Water District's surplus energy, which they had not been willing to do in 1937. So the 1945 contract was made. As we have said, the Government says that that contract intended to include, after 1954, the energy that the plaintiffs had been getting. The plaintiffs say that the 1945 contract did not include the energy which they would continue to be entitled to if their contracts were renewed.

The question of what was intended by the 1945 contract has caused great concern to the Government, of course, since if it did include the energy which the plaintiffs had been getting, and if the plaintiffs had a statutory right to renewal, the Government was in the position of having sold the same thing to different parties. But we think that the intention of the Government and the third parties, when they made the 1945 contract, is not conclusive, and indeed is scarcely relevant, so far as the plaintiffs are concerned. We do not, therefore, undertake to determine the intent of the 1945 contract. We note that the Government's officials had great difficulty in making up their minds as to its intent.

The plaintiffs say that the only authority which the Secretary had for the sale of electrical energy was given him in section 5 of the Project Act; that section 5 says that in making contracts for the sale of energy, section 5 (b) *inter alia*, shall govern; that section 5 (b) is the renewal privilege section; that in several places in the plaintiffs' contracts there were statements that the contracts were made pursuant to the Project Act. They urge, therefore, that they are entitled to the benefits of the statute. They further say that the

equity of the statute providing for the renewal privilege makes it applicable to them. It was intended to protect those who had invested in facilities to use or distribute electricity from the dam, and customers who had become dependent upon the continued flow of that electricity. The plaintiffs say, and it would seem to be true, that these facts existed in their situations.

The Government points to the fact that the plaintiff Citizens represented to the Arizona Corporation Commission that it should be allowed to write off its investment in facilities to transmit energy from the dam during the 15-year period of its contract, and says that this shows that that plaintiff did not count on a renewal privilege. We have already discussed the reasons why the plaintiffs may not have thought that there would be a renewal of their contracts.

The applications of the plaintiffs for renewal were rejected by the Secretary in 1952. They persisted in their applications, and on March 2, 1954, the Secretary offered them, in writing, extensions of their contracts to May 31, 1987. They accepted these offers in writing, but the Secretary ultimately refused to execute formal documents of renewal, and they have received no electrical energy since early in 1955. The plaintiff Citizens bases its claim, in the alternative, upon the renewal of its contract which, it says, was accomplished by the correspondence just referred to. In view of our conclusion upon the whole case, we do not decide this question.

The Government argues that the Secretary, in his dealings with the plaintiffs, was not acting for the United States, but for Water District. It is true that the primary benefit of the sale of Water District's unused energy inured to Water District, because the price received for it was credited to Water District's account. The contract with Water District might have provided that it could market its own unused energy,

so long as it did not send it to the area where it would compete with City and Edison. But the Government did not choose to have other persons selling Hoover Dam power at wholesale. Its contract with Water District carefully provided that the Government, through the Secretary, would be the one to do the selling, if it was done. The Secretary was not acting as an agent of Water District. He was acting for the United States, and was carrying out its policy of keeping the sale of power under its control. He was also furthering the interest of the United States in keeping Water District from being overwhelmed by its obligation to pay for power for which it had no use, and thereby, possibly, being disabled from carrying out its contract with the United States.

There is an apparent inconsistency in the position of the plaintiffs, in that they do not claim that their rights, under their renewals, would be as extensive as their rights under their original contracts. It will be remembered that their contracts gave them what were, in effect, options to take specified amounts of electricity, but only bound them to take and pay for much smaller amounts. Water District was willing, in 1937, to permit the Secretary to so contract because it was certain that there would be sufficient surpluses, until the end of 1954, to satisfy those contracts. But the contracts certainly contemplated that if Water District had no surplus after 1954, there would be nothing to sell as surplus to anyone. And they certainly would have contemplated, if it had occurred to the parties, that no extension of the contracts should deprive Water District of electricity which it needed for its own purposes. The plaintiffs claim only the rights to renewals which would have given them such electricity, if any, as was surplus to Water District's needs after 1954, and was within the amounts set in their original contracts.

Our conclusion is that the plaintiffs were entitled, under the statute, to renewals of their contracts with the limitations which they concede, and that the Government violated their statutory rights when it denied them renewals and refused to give them the electrical energy to which renewals of their contracts would have entitled them.

The plaintiffs are entitled to recover, and judgment will be entered to that effect. The amounts of the judgments will be determined in further proceedings under Rule 38 (c).

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

2. Order Overruling Motions for Rehearing:

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this fifth day of June, 1957, that said motions be and the same are overruled as follows:

* * * * * * *

364–55 Citizens Utilities Company

381–55 California-Pacific Utilities Company

Defendant's motion and the motions by the third parties, City of Los Angeles and The Metropolitan Water District of Southern California.

BY THE COURT

/s/ Marvin Jones

MARVIN JONES

Chief Judge.

U. S. GOVERNMENT PRINTING OFFICE 1957